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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., ADMINISTRATOR OF THE ESTATE OF L. T. McGEE, PETITIONER,

versus

EDMUND V. COLE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY HAMMER,
Columbia, South Carolina,

HENRY H. EDENS,
Columbia, South Carolina,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 7, 1964.

OPINIONS BELOW

The opinion of the District Court (App. 17-24) is reported in 217 Fed. Supp. 280, and the opinion of the Court of Appeals (App. 25-29) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on the 7th day of January, 1964 (App. 25). Petition for rehearing (App. 29) was denied on the 10th day of February, 1964 (App. 33). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether in actions tried by the court without a jury a district judge's findings of fact based upon conflicting inferences from undisputed evidence are subject to review and may be set aside by a federal appellate court when such findings are not clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

This case involves Rule 52 (a) of the Federal Rules of Civil Procedure, the South Carolina Wrongful Death Statute, Section 10-1951 *et seq.* of the Code of Laws for South Carolina, 1962, and the South Carolina Uniform Act Regulating Traffic on the Highways, Sections 46-201 *et seq.* of the Code of Laws of South Carolina, 1962, the pertinent parts of which are set forth below:

Rule 52 (a) of Federal Rules of Civil Procedure.

"In all actions tried upon the facts without a jury * * * the court shall find the facts specially * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses."

Section 10-1951, Code of Laws of South Carolina, 1962.

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death

had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured. * * *"

Section 10-1952, Code of Laws of South Carolina, 1962.

"Every such action shall be for the benefit of the * * * child * * * of the person whose death shall have been so caused. * * *"

Section 46-381 of the Code of Laws for South Carolina, 1962.

"Upon all roadways of sufficient width a vehicle shall be driven on the right half of the roadway. * * *"

Section 46-362 of the Code of Laws for South Carolina, 1962.

"* * * the speed of any vehicle not in excess of the limit specified * * * shall be lawful, such limits established in this section being:

3. 55 miles per hour * * *. Any speed in excess of such limit or limits established as herein otherwise authorized shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful."

Section 46-321 of the Code of Laws of South Carolina, 1962.

"The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 46-323. * * *"

STATEMENT

Petitioner, as administrator of the Estate of L. T. McGee, deceased, brought suit against respondent, Edmund V. Cole, under the wrongful death statute of South Carolina to recover damages for negligence and wantonness of respondent in driving his automobile to the left of the center of the highway (westbound lane), traveling at an excessive rate of speed and zigzagging along the highway in violation of the South Carolina statute law, as the result of which petitioner's intestate was struck and killed upon reaching the westbound lane while crossing the highway from the eastbound lane of travel, after which respondent fled the scene without rendering aid and assistance and leaving petitioner's intestate to die on the highway.

Respondent denied the ownership and operation of the offending vehicle and on this issue the evidence of record showed that the offending automobile fitted the description of respondent's automobile in minute details as to make, color, type, state and army post license tags and even as to damaged parts; and that respondent was in sole and exclusive possession of such automobile at the time of the fatality.

On the issues of negligence, wantonness and proximate cause, the evidence was undisputed that intestate's body was found lying on the highway in the westbound lane (respondent's wrong lane of travel), that it was badly crushed and mangled, that the offending vehicle was zigzagging along the highway at an excessive rate of speed, that it was being driven on its left or wrong side of the roadway (westbound lane), as crucially noted by the court below in footnote 1 of its opinion that "skidmarks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.",

and that after petitioner's intestate was struck, the driver fled the scene without stopping to render aid and assistance.

Notwithstanding the foregoing undisputed evidence pertaining to the location of the body and the skid marks, and the compelling evidence identifying respondent as the owner and operator of the offending automobile, no explanation was offered by respondent at the trial for driving on the wrong side of the highway.

The case was tried without a jury and on the basis of the foregoing evidence, the Honorable C. C. Wyche, an outstanding and able trial judge of approximately twenty-five years' experience, who had served in the South Carolina Legislature and had sat as an acting associate judge of the South Carolina Supreme Court, applying his experience "with the main springs of human conduct", found from the circumstantial evidence of record that respondent Cole was the owner and operator of the automobile which struck and killed petitioner's intestate; and made further findings of fact based upon inferences from the undisputed evidence (open to conflicting inferences under South Carolina law) that respondent was negligent and wanton, that such negligence and wantonness proximately caused the death of petitioner's intestate and that the intestate was not guilty of contributory negligence. The court thus awarded damages against respondent in the amount of Twenty-five Thousand ($25,000.00) Dollars.

Upon appeal, the court below reversed the judgment of the district court. It by-passed ruling upon the correctness of the district judge's findings as to the issues of ownership and operation of the offending automobile. It predicated the reversal on its own independent findings of fact, based upon the conflicting inferences from the undisputed evidence, different from those reached by the district judge. It disregarded the broad experience of the district judge

with the "main springs of human conduct" and, treating the findings of fact as conclusions of law, found and concluded; that, notwithstanding the mangled and crushed condition of the body indicating the excessive rate of speed at which the automobile was traveling and the testimony concerning the zigzagging and excessive speed of the offending automobile, the speed was not the proximate cause of the fatality; and also, notwithstanding the undisputed evidence of the skidmarks of the automobile on its wrong side of the road, the failure of the driver to stop and render assistance, and the lack of an explanation by the driver for traveling on the wrong side of the road, the court below reached its own findings of factual inferences that the driver of the automobile was not guilty of actionable negligence and wantonness, and that petitioner's intestate was guilty of contributory negligence.

The court below thus concluded that there was no evidence of actionable primary negligence which could form a basis for the district judge's finding that respondent was guilty of wantonness (as to which contributory negligence is not a defense under South Carolina law) in leaving the scene without stopping to render aid and assistance. Petitioner filed a petition for rehearing (App. 29) which was denied by the Court below on February 10, 1964 (App. 32).

REASONS FOR GRANTING THE WRIT

1. Existing conflict among the circuits and also among the courts within specific circuits on the issue presented:— The issue in this case relating to the construction of Rule 52 (a) of the Federal Rules of Civil Procedure is whether a district judge's findings of fact, even though not clearly erroneous, are subject to review and may be set aside by a federal appellate court where such findings are based upon conflicting inferences from undisputed evidence. On this

issue it is clear that there is an existing conflict among the circuits, *Landgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) 104. Compare *Orcis v. Higgins* (C. A. 2), 180 F. (2d) 537, and *Pflugradt v. U. S.* (C. A. 7, 1962), 310 F. (2d) 412, holding that a federal appellate court is empowered to set aside findings of fact based upon factual inferences from undisputed evidence without regard to the "clearly erroneous" rule, with *Randall Foundation, Inc., v. Riddell* (C. A. 9, 1957), 244 F. (2d) 803, and *Landgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) 104, holding to the contrary. The existing conflict among the circuits is also pointed out in Volume 2B Barron & Holtzoff, Federal Practice and Procedure, Section 1132, at pages 516, 523-24 and in Volume 49 (April, 1963), Virginia Law Review, page 506, which exhaustively treats the problems of appellate review under Rule 52 (a). There is also a conflict on this issue among the courts within some of the circuits.[1] Those courts holding that a federal appellate court is empowered to review and set aside findings of fact based upon conflicting inferences from undisputed evidence seek to justify their right to review and set aside such findings by labeling and treating them as conclusions or matters of law, *Quikset Locks, Inc., v. Hillaren* (C. A. 9, 1954), 210 F. (2d) 483; or by reasoning that inferences from undisputed evidence involves legal reasoning which frees the reviewing court from the "clearly erroneous" rule under Rule 52 (a), *Hillard v. Commissioner* (C. A. 5, 1960), 281 F. (2d) 279, *Galina Oaks Corp. v. Scofield* (C. A. 5, 1954), 218 F. (2d) 217; or that the appellate court is just as capable as the trial judge to draw inferences from uncontradicted evidence, *E. H. Sheldon & Co. v. Commissioner* (C. A. 6, 1954), 214 F. (2d) 655. On this point, as was so aptly stated by the author of the note on the subject of appellate

[1] See cases collected in volume 49 (April, 1963), Virginia Law Review, page 506, footnote 5.

review of findings of fact based on undisputed evidence in 49 Virginia Law Review (April, 1963), page 527:

> "The terminology of these courts is varied, but they all reach the same result—free review of facts untrammeled by Rule 52 (a)'s mandate."

Also apposite to the question presented herein is the statement of the author at page 527 that:

> "The court's method of circumventing rule 52 (a), which appears quite reasonable at first blush, becomes, on closer investigation, a questionable manipulation of traditional principles to achieve a predetermined objective. * * * Upon close analysis, the rationale of the court's manipulation is indeed difficult to justify, irrespective of the desirability of broader appellate review where the facts are undisputed."

And just as this Court in *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, reasoned and concluded that under the Federal Employer's Liability Act the lower court cannot permit the defense of "assumption of risk" by changing its name to "non-negligence", so likewise in the case at bar, it is respectfully submitted that the court below should not be permitted to set aside "findings of fact" by treating them as "conclusions or matters of law" merely because such findings were based upon inferences from undisputed evidence. The reasoning of this Court in the *Tiller case* applies with equal force in the instant case.

The question presented herein is important because, as stated by Judge Sanborn, speaking for the Eighth Circuit in *Pendergrass v. New York Life Ins. Co.*, 181 F. (2d) 136, 138:

> "The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of

justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

And speaking in the same vein for the Ninth Circuit, Judge Duniway in *Landaren v. Freeman*, 307 F. (2d) 104, 114, 115 said:

"It seems to us that the Clark view is favored by history. Rule 52 (a) incorporates the type of review that previously was had in equity cases. * * * Nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52 (a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. Rule 52 (a) explicitly clearly applies where the trial court has not had an opportunity to judge of the credibility of witnesses."

The allowance of the petition in this case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the uncertainty and conflicts which exist, not only among the circuits, but also within the courts of some of the circuits.

2. The decision is not in accord with applicable decisions of this Court:—The decision in the court below is in conflict with the ruling by this Court that findings of fact made by the district judge are binding on an appellate court unless clearly erroneous and that this rule applies also to factual inferences from undisputed evidence.

United States v. United States Gypsum Co., 333 U. S. 364;
Commissioner of Internal Revenue v. Duberstein, 363 U. S. 270.

The only circumstances under which findings of fact, whether based upon disputed evidence or upon inferences from undisputed evidence, may be set aside are where such findings are "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed", *United States v. United States Gypsum Co., supra;* or when not supported by substantial evidence or are clearly against the weight of the evidence or induced by an erroneous view of the law, *Sanders v. Leach* (C. A. 5), 158 F. (2d) 486; *Cedillo v. Standard Oil of Texas* (C. A. 5), 291 F. (2d) 246. None of these circumstances are present in the case at bar. This is clearly manifested when we consider that under South Carolina law questions of negligence and proximate cause when based upon violations of the Uniform Traffic Act of South Carolina which, *inter alia*, provides that a vehicle shall be driven on the right half of the roadway, Section 46-381 of the Code of Laws for South Carolina, 1962, and regulates the speed limits, Section 46-362 of the Code of Laws for South Carolina, 1962, are factual issues for the determination of the fact-finding tribunal, for as stated by the South Carolina Supreme Court in *Eickhoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. (2d) 153, 155:

> "It is unnecessary to cite authority that the violation of a statute is negligence *per se* and whether or not such breach contributed as a proximate cause to plaintiff's injury is ordinarily, and here, a question for the jury."

And that an appellate court will not try facts of cases *de novo* or set aside a finding of fact as clearly erroneous merely because it might give the facts another construction or resolve the ambiguities differently has been firmly established by the decisions of this Court.

United States v. E. I. DuPont de Nemours, 351 U. S. 377;

United States v. Nat'l Assn. of Real Estate Boards, 339 U. S. 485.

Notwithstanding the relatively recent decision of this Court in *Commissioner of Internal Revenue v. Duberstein*, 363 U. S. 270, there is still a conflict among the circuits as to whether the "clearly erroneous" rule is applicable to findings of fact based upon inferences from undisputed evidence. The Seventh Circuit in *Pfluerath v. U. S.*, 310 F. (2d) 412, held that this rule does not apply to inferences from undisputed facts. But for a contrary holding see *Lundgren v. Freeman* (C. A. 9, 1962), 307 F. (2d) [illegible].

It is respectfully submitted that the allowance of the petition in the case at bar would afford this Court the opportunity to resolve the prevalent doubts and conflicts among the circuits on an important and far reaching question of appellate review and would be conducive to the fair and efficient administration of justice.

3. The decision of the court below involves an important question of state law affecting the public health, safety and welfare and was decided in a way in conflict with applicable state law:—Reference to the opinion of the court below in footnote 1 clearly indicates that it was undisputed that the automobile which struck petitioner's intestate was traveling off its wrong side of the road. It was also undisputed that intestate's body was badly mangled and crushed, evidencing the excessive speed at which the automobile was traveling, and in addition thereto there was testimonial evidence relating to the excessive speed. And finally, it was also undisputed that after petitioner's intestate was struck, the driver fled the scene without stopping to render aid and assistance; and that upon the identity of the automobile and driver being established by cogent and compelling circum-

stantial evidence, the driver nevertheless failed to offer any explanation at the trial for being on the wrong side of the road.

Notwithstanding the foregoing evidence of record, the court below reversed, setting aside the trial judge's findings of fact that the driver was negligent and wanton, that intestate's death was proximately caused by the negligence and wantonness of the driver, and that intestate was not guilty of contributory negligence. In so setting aside the trial judge's findings and reversing, the court below decided the case in a way in conflict with the decisions of the South Carolina Supreme Court, *Bowers v. Carolina Public Service Company*, 148 S. C. 161, 145 S. E. 790, and *Tinsley v. Parris*, 174 S. C. 417, 178 S. E. 496, the headnote of which pertinently reads as follows:

> "Operation of motor vehicle on left side of highway in violation of statute, where injury results, raises presumption that violation proximately caused the injury."

The decision is also in conflict with a factually analogous case, *Brock v. Carolina Scenic Stages and Carolina Cas. Co. of Burlington*, 219 S. C. 360, 65 S. E. (2d) 468, wherein the South Carolina Supreme Court said:

> "We think the circumstances heretofore set out, when considered together, are sufficient **in the absence of any explanation by the defendants**, to warrant an inference that the collision was caused by the bus being driven to the left of the center of the highway * * *."

The cases of *Smith v. Biggs* (C. A. 4), 223 F. (2d) 839, and *Williams v. Ford*, 233 S. C. 304, 104 S. E. (2d) 378, upon which the court below relied in reversing the judgment of the District Court are clearly distinguishable on the facts from the case at bar and, therefore, not controlling herein. In *Smith v. Biggs*, *supra*, the occurrence took place in defendant's proper lane of travel, whereas in the instant

case the evidence shows that defendant was traveling on his wrong side of the highway when the deceased was struck; and in *Williams v. Ford, supra*, there was an uncontradicted, complete, and adequate explanation offered by the defendant for crossing over to his left or wrong side of the roadway, an explanation totally lacking and absent in the present case.

The decision of the court below, in effect, constitutes judicial sanction for wrongdoer motorists to escape civil liability for fatally striking down pedestrians while driving on the wrong side of the roadway by fleeing the scene in callous disregard of the lives of the victims and offering no explanation for being on the wrong side of the roadway, notwithstanding compelling circumstantial proof disclosing the identity of such "hit and run" motorists.

This case presents an important question which materially affects the public health, safety and welfare of the people of the State of South Carolina. The Court below, in reversing, not only decided this question in a way in conflict with applicable state law, but also has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, for in taking this action, the court below exceeded the power conferred upon it by Rule 52(a), as that power is defined by this Court in *United States v. United States Gypsum Co.*, 330 U. S. 364.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY HAMMER,

HENRY H. EDENS,

Attorneys for Petitioner.